

THE INTERNATIONAL COMMERCIAL ARBITRATION MODEL AND PUBLIC INTERNATIONAL LAW DISPUTES

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As someone who has been close to the ICC for more than fifteen years, my position on this afternoon's topic must seem preordained, except to those cynical enough to believe that familiarity breeds contempt rather than more familiarity. Although, or perhaps because, I am a strong proponent of international commercial arbitration as it now is, I have some concerns about the adequacy and appropriateness of it as a model for the resolution of the kinds of public law questions that have come up and surely will arise with ever increasing frequency under the now thousands of treaties providing for arbitration of investment disputes.

I do not question what Judge Holtzmann has said about the Iran-United States Claims Tribunal and its use of the same UNCITRAL Rules¹ that are frequently an option under the investment treaties. The Tribunal has been a grand success and in no small part because of the quality of the judges who have served it. Arbitration before the Tribunal, however, is quite a different animal from ordinary international commercial arbitration or from the structure provided for treaty arbitration of investments. We notice that the Tribunal has "judges", indeed, it has a stable cadre of these judges, it sits in one place, the Hague, it publishes its decisions, as any proper court should do, and no doubt over the years it has developed a set

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1. The Arbitration Rules of the United Nations Commission for International Trade Law (adopted by UNCITRAL on April 28, 1976, and approved by United Nations General Assembly Resolution 31/95 on December 15, 1976) [hereinafter the UNCITRAL Rules.] The UNCITRAL Rules are reprinted in II YEARBOOK COMMERCIAL ARBITRATION 147 (1977).

of procedures, modes of proof and terms of substantive jurisprudence well known to the bar that practices before it.²

This recital will bring to mind the many points of difference between the Iran-United States Tribunal and what I will call ordinary international arbitration. I will briefly touch on three of them: confidentiality, fluidity of process, and the uncertain or varying degree of judicial review.

First as to confidentiality. In ICC practice this is carried to the point that the ICC will not even confirm that X and Y are parties to an arbitration pending before it. Confidentiality is required under the ICSID Additional Facility Rules³, frequently availed of in investment treaty arbitrations, as it is under the UNCITRAL Rules.⁴ Confidentiality appears to be one of the most significant attractions of international commercial arbitration for the parties that resort to it.⁵ In the usual case the hearings are closed⁶ and the award remains undisclosed, unless there are subsequent judicial proceedings. Consideration surely must be given to whether it is

2. See, e.g., Charles N. Brower, *Evidence Before International Tribunals: The Need for Some Standard Rules*, 28 INT'L LAW. 47, 49-54 (1994) (reporting on the principles "routinely applie[d]" by the Hague Tribunal in evaluating evidence).

3. Article 14(2) requires each arbitrator to sign a declaration that includes the statement that "I shall keep confidential all information coming to my knowledge as a result of my participation in this proceeding as well as the contents of any award made by the Tribunal." If he fails to do so by the conclusion of the first session of the tribunal, he "shall be deemed to have resigned." *Id.* Under article 24(1) "The deliberations of the Tribunal shall take place in private and remain secret." Article 39(2) states that "The Tribunal shall decide, with the consent of the parties, which other persons besides the parties, their agents, counsel and advocates, witnesses and experts during their testimony, and officers of the Tribunal may attend the hearings." Under article 44(2) the minutes of hearings "shall not be published without the consent of the parties."

4. Article 25(4) provides that "Hearings shall be held *in camera* unless the parties otherwise agree." Article 35(2) provides that "The award may be made public only with the consent of the parties."

5. According to the results of a recent survey of practitioners and users of international commercial arbitration, the confidentiality of arbitral proceedings ranked behind only the neutrality of the forum and the assurance of worldwide enforcement of the award as an attraction of arbitration. CHRISTIAN BÜHRING-UHLE, *ARBITRATION AND MEDIATION IN INTERNATIONAL BUSINESS* 395-96 (1996).

6. This is explicitly provided for in the major international arbitration rules. Arbitration Rules of the International Court of Arbitration of the International Chamber of Commerce (the ICC Rules)(1998), art. 21(3) ("Save with the approval of the Arbitral Tribunal and the parties, persons not involved in the proceedings shall not be admitted [to the hearings]"); Arbitration Rules of the London Court of International Arbitration (LCIA Rules) (1998), art. 19.4 ("All meetings and hearings shall be private unless the parties agree otherwise in writing or the Arbitral Tribunal directs otherwise"); International Arbitration Rules of the American Arbitration Association (AAA International Arbitration Rules) (1997), art. 20(4) ("Hearings are private unless the parties agree otherwise or the law provides to the contrary"); UNCITRAL Rules, article 25(4), *supra* note 4.

an appropriate element of litigations (before arbitrators, to be sure) that challenge important national regulation.

A second attraction of ordinary international commercial arbitration is the very fluidity of the available procedures. All the major international arbitration rules, again including the UNCITRAL Rules, leave the shaping of a particular case to the expectations, desires and traditions of the parties and the arbitrators.⁷ It is, in fact, the very intention of these rules to accommodate different legal traditions and legal cultures. Whether there is any discovery at all, how witnesses are questioned, whether partisan expert testimony may be presented—these and many other such questions are left for case by case arrangement. Some might well conclude that such uncertainty is an obstacle to adjudication of public law questions.

These two issues may be thought to take on particular importance in the context of treaty arbitration of public law regulations when one considers that, although the details of the individual cases will vary, these arbitrations are primarily focused on giving content to or interpretation and implementation of the treaty constraints on government action that affects investment. How does a consistent jurisprudence develop if a decision must be reached in substantial ignorance of others on the same issue? In private commercial arbitration, by contrast, the issues in controversy are all over the lot and usually of narrow compass or effect, and the applicable law is whatever the parties have chosen.⁸

A third circumstance that almost surely matters less in respect of private international arbitration than in public law arbitration is the varying degree of post-award judicial scrutiny. Under ICSID procedures (applicable in many investment treaty arbitrations), there is no national court review of any kind: the national court's obligation under Article 54 of the Washington Convention is simply to enforce.⁹ On the other hand, an

7. ICC Rules, art. 15(1); LCIA Rules, art. 14.1; AAA International Arbitration Rules, art. 16(1); UNCITRAL Rules, art. 15(1). These provisions reflect the principle enunciated in Article 19(1) of the UNCITRAL Model Law on International Commercial Arbitration (1985): "Subject to the provisions of this Law, the parties are free to agree on the procedure to be followed by the arbitral tribunal in conducting the proceedings." This provision has been described by the UNCITRAL Secretariat as "the Magna Carta of Arbitral Procedure." See HOWARD M. HOLTZMANN & JOSEPH E. NEUHAUS, A GUIDE TO THE UNCITRAL MODEL LAW ON INTERNATIONAL COMMERCIAL ARBITRATION: LEGISLATIVE HISTORY AND COMMENTARY 364-68 (1989).

8. This generalization is subject to the possible application of what is usually termed the "mandatory law" of a jurisdiction other than the jurisdiction whose law has been stipulated as applicable by the agreement of the parties. See, e.g., Yves Derains, *Public Policy and the Law Applicable to the Dispute in International Arbitration*, in *COMPARATIVE PRACTICE AND PUBLIC POLICY IN ARBITRATION* 242-254 (Pieter Sanders ed. 1986).

9. Paragraph 1 of article 54 provides in part as follows: "Each Contracting State shall recognize an award rendered pursuant to this Convention as binding and enforce the pecuniary

award rendered under the ICSID Additional Facility procedures, which are not subject to the Washington Convention, or under the UNCITRAL Rules, is subject to whatever judicial review is available under local law at the place of arbitration and under Article V of the New York Convention almost everywhere.¹⁰ If coherent investment treaty interpretation is desirable, or even judged indispensable, is this diversity in the review process constructive?

If there are issues as to process, there are also implications that arise from the possible results of these treaty arbitrations. In the usual case the investor challenges host country regulation. What is the standard by which such a challenge is to be weighed? Is it something akin to the traditional American view of what constitutes a taking? Under the Fifth Amendment it has recently been held by the Supreme Court that "mere diminution in the value of something, however serious, is insufficient to demonstrate a taking."¹¹ Or is it the proposition announced by the Iran-United States Claims Tribunal in the SEDCO case some years ago, that "a state is not liable for economic injury which is a consequence of bona fide regulation within the accepted 'police power' of states?"¹² Or is it something else, or several somethings else, applied variously by successive arbitral panels operating confidentially and substantially or totally immune from judicial review? Is this a recipe for success?

If arbitral procedures are applied where they do not necessarily fit well, injurious consequences may follow for the arbitral process where it does serve well. In some countries, though not the United States, predispute arbitration clauses in consumer or employment contracts are not enforceable.¹³ Where, as in this country, they are enforceable¹⁴—at least so

obligations imposed by that award within its territories as if it were the final judgment of a court in that State."

10. Article V of the New York Convention establishes the minimum standards for recognition of a foreign award in every state that is a party to it. By contrast, it is generally accepted that an award may be set aside only in the state where (or under the law of which) the award was rendered, and that in setting aside an award the state where it was rendered is not constrained by the New York Convention in the scope of its review. *See International Standard Elec. Corp. v. Bridas Sociedad Anonima Petrolera*, 745 F. Supp. 172 (S.D.N.Y. 1990) (New York District Court had no authority to set aside an arbitral award rendered in Mexico); *Yusuf Ahmed Alghanim & Sons v. Toys "R" Us, Inc.*, 126 F.3d 15 (2d Cir. 1997) (an award in international arbitration rendered in the United States may be set aside for "manifest disregard of the law" although that is not a permitted ground under the New York Convention on which an international award rendered abroad may be refused recognition).

11. *Concrete Pipe & Prod. Co. of California v. Construction Laborers Pension Trust*, 508 U.S. 602, 645 (1993).

12. *SEDCO Inc. v. National Iranian Oil Co.*, 9 Iran-US C.T.R. 248, 275 (1985).

13. For example, under Article 2061 of the French Civil Code, predispute arbitration clauses, as distinct from the submission to arbitration of existing disputes, is generally authorized

far—there is ample evidence of intense pressure on the court system to intrude into the arbitration process in the interest of perceived “fairness”¹⁵: is the expense prohibitive, is the panel fairly composed, is there adequate access to necessary evidence, did the arbitrator, to cite a recent decision in the Second Circuit, “manifestly disregard the law or the evidence or both?”¹⁶ A concern one might reasonably have is that prophylactic doctrines justifying increased court intervention into arbitration, contrived to deal with such perceived problems, will be unthinkingly extended to international arbitrations between sophisticated business enterprises, where they are not needed and where they would run counter to the most significant attraction of international commercial arbitration, its freedom from interference by national courts.¹⁷

I am concerned that judicial action along similar lines may follow if arbitral decisions of public law questions are seriously unacceptable in the politics of the host country, with a negative spill-over effect on current practice in private international commercial arbitration. Courts will not necessarily restrain themselves, as the Indonesian courts did not in the recent CalEnergy geothermal project cases.¹⁸ Constraints on judicial review can be evaded or ignored. Indeed, treaties can be denounced or simply not adhered to. Dubious doctrines may well be born of difficult cases.

In light of the foregoing, it would be well to consider improvements that could be introduced into arbitration of public law questions which would represent departures from the international commercial arbitration model, such as substantive standards applied with reasonable uniformity, transparent procedures, available jurisprudence, and perhaps, following the example of the Iran-United States Claims Tribunal, the establishment of panels of arbitrators. In that way the undoubted value of honest and

only for contracts concluded “by reason of professional activity,” as distinct from submission of existing disputes to arbitration, permitted by article 2059. Article 631 of the Commercial Code confines the permitted scope of pre-dispute arbitration clauses to matters over which the commercial courts have jurisdiction.

14. See *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991).

15. See, e.g., *Cole v. Burns Int’l Sec. Services*, 105 F.3d 1465 (D.C. Cir. 1997).

16. *Halligan v. Piper Jaffray, Inc.*, 148 F.3d 197, 204 (2d Cir. 1998), cert. denied, 526 U.S. 1034 (1999).

17. The Bühring-Uhle study, *supra* note 5, lists neutrality—primarily freedom from the intrusion of the national courts of either contracting party—as the “most highly relevant” attraction of international commercial arbitration.

18. See Mark Kantor, *International Project Finance and Arbitration with Public Sector Entities: When is Arbitrability a Fiction?*, 24 FORDHAM INT’L L. J. 1122 (2001).

neutral decisions that international arbitration can provide may be brought effectively to bear on these important questions.